

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 JOHN STONEWALL,)
7 Plaintiff,) No. CV-09-3004-JPH
8 v.)
9 MICHAEL J. ASTRUE, Commissioner) ORDER GRANTING DEFENDANT'S
10 of Social Security,) MOTION FOR SUMMARY JUDGMENT
11 Defendant.)
12)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 16, 2009. (Ct. Rec. 21, 23). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents the Commissioner of Social Security ("Commissioner"). Plaintiff filed a reply brief on September 28, 2009. (Ct. Rec. 25.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 23) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 21).

JURISDICTION

Plaintiff protectively filed an application for disability insurance benefits (DIB) on April 11, 2005, alleging disability due to monocular vision with loss of depth perception, dizziness,

1 nausea, loss of balance, night blindness, fatigue, headaches,
 2 diabetes, hypertension, obesity, depression, and anxiety-related
 3 problems. (Tr. 61-63,73,100.) The application alleges onset as of
 4 April 3, 2002. (Tr. 61-63.) The application was denied initially
 5 and on reconsideration. (Tr. 44-46,49-50.)

6 At a hearing before Administrative Law Judge (ALJ) Riley
 7 Atkins on May 14, 2008, plaintiff, represented by counsel, and
 8 vocational expert Kathryn Heatherly testified. (Tr. 332-344.) On
 9 May 22, 2008, the ALJ issued an unfavorable decision. (Tr. 16-
 10 28.) The Appeals Council denied Mr. Stonewall's request for
 11 review on November 25, 2008. (Tr. 5-7.) Therefore, the ALJ's
 12 decision became the final decision of the Commissioner, which is
 13 appealable to the district court pursuant to 42 U.S.C. § 405(g).
 14 Plaintiff filed this action for judicial review pursuant to 42
 15 U.S.C. § 405(g) on January 6, 2009. (Ct. Rec. 1, 4.)

STATEMENT OF FACTS

17 The facts have been presented in the administrative hearing
 18 transcript, the ALJ's decision, the briefs of both plaintiff and
 19 the Commissioner, and are briefly summarized here.

20 Plaintiff was 51 years old at the time of the hearing. (Tr.
 21 334.) He went to the ninth grade and earned a GED. Plaintiff has
 22 special training in first aid, equipment operation, and traffic
 23 flagging. (Tr. 106, 334.) He has past relevant work as a truck
 24 driver and road laborer. (Tr. 341.) Plaintiff has problems
 25 controlling his blood sugar, and with both of his eyes, but the
 26 right eye is worse. (Tr. 334-335.) He lives on five acres. He is
 27 able to mow his lawn but, when his blood sugar drops, he is unable
 28 to do anything the rest of the day. (Tr. 335, 337.) Plaintiff has

1 no depth perception for walking and experiences dizzy spells.
2 While mowing he tends to trip going over rough ground. (Tr. 336-
3 338.) Walking or reading or "anything" causes dizziness "like car
4 sickness" - a problem that began in about 2005. (Tr. 336.) When he
5 experiences these spells, plaintiff lays down until the feeling
6 passes, usually 2-3 hours. (Tr. 336.) Plaintiff has had no
7 treatment for it. He told "the doctor I get it once in a while and
8 they, I just go lay down to get everything straightened out and
9 then get back up." (Tr. 337.)

10 Plaintiff has a driver's license and drives eight miles into
11 town (Goldendale) from his home, but does not feel safe doing it
12 because of his vision problems. (Tr. 340.) He has poor
13 concentration and dislikes crowds. (Tr. 338.) Plaintiff visits at
14 his brother's house, hunts elk with his father-in-law, plays with
15 his dogs, tinkers occasionally in his garage and tries to do the
16 dishes and some housecleaning. (Tr. 338-340.) He lives with his
17 spouse who works full time and their ten year old son. (Tr. 337,
18 339.)

19 **SEQUENTIAL EVALUATION PROCESS**

20 The Social Security Act (the "Act") defines "disability"
21 as the "inability to engage in any substantial gainful activity by
22 reason of any medically determinable physical or mental impairment
23 which can be expected to result in death or which has lasted or
24 can be expected to last for a continuous period of not less than
25 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
26 Act also provides that a Plaintiff shall be determined to be under
27 a disability only if any impairments are of such severity that a
28 plaintiff is not only unable to do previous work but cannot,

1 considering plaintiff's age, education and work experiences,
2 engage in any other substantial gainful work which exists in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
4 Thus, the definition of disability consists of both medical and
5 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
6 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled.
9 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
10 is engaged in substantial gainful activities. If so, benefits are
11 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
12 not, the decision maker proceeds to step two, which determines
13 whether plaintiff has a medically severe impairment or combination
14 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
15 416.920(a)(4)(ii).

16 If plaintiff does not have a severe impairment or combination
17 of impairments, the disability claim is denied. If the impairment
18 is severe, the evaluation proceeds to the third step, which
19 compares plaintiff's impairment with a number of listed
20 impairments acknowledged by the Commissioner to be so severe as to
21 preclude substantial gainful activity. 20 C.F.R. §§
22 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
23 App. 1. If the impairment meets or equals one of the listed
24 impairments, plaintiff is conclusively presumed to be disabled.
25 If the impairment is not one conclusively presumed to be
26 disabling, the evaluation proceeds to the fourth step, which
27 determines whether the impairment prevents plaintiff from
28 performing work which was performed in the past. If a plaintiff

1 is able to perform previous work, that Plaintiff is deemed not
 2 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
 3 At this step, plaintiff's residual functional capacity ("RFC")
 4 assessment is considered. If plaintiff cannot perform this work,
 5 the fifth and final step in the process determines whether
 6 plaintiff is able to perform other work in the national economy in
 7 view of plaintiff's residual functional capacity, age, education
 8 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
 9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon plaintiff to establish
 11 a *prima facie* case of entitlement to disability benefits.

12 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
 13 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 14 met once plaintiff establishes that a physical or mental
 15 impairment prevents the performance of previous work. The burden
 16 then shifts, at step five, to the Commissioner to show that (1)
 17 plaintiff can perform other substantial gainful activity and (2) a
 18 "significant number of jobs exist in the national economy" which
 19 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 20 Cir. 1984).

21 STANDARD OF REVIEW

22 Congress has provided a limited scope of judicial review of a
 23 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 24 the Commissioner's decision, made through an ALJ, when the
 25 determination is not based on legal error and is supported by
 26 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
 27 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 28 1999). "The [Commissioner's] determination that a plaintiff is

1 not disabled will be upheld if the findings of fact are supported
 2 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
 3 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
 4 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
 5 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 8 573, 576 (9th Cir. 1988). Substantial evidence "means such
 9 evidence as a reasonable mind might accept as adequate to support
 10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 11 (*citations omitted*). "[S]uch inferences and conclusions as the
 12 [Commissioner] may reasonably draw from the evidence" will also be
 13 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965).
 14 On review, the Court considers the record as a whole, not just the
 15 evidence supporting the decision of the Commissioner. *Weetman v.*
 16 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
 17 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to
 19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 20 evidence supports more than one rational interpretation, the Court
 21 may not substitute its judgment for that of the Commissioner.
 22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 23 (9th Cir. 1984). Nevertheless, a decision supported by
 24 substantial evidence will still be set aside if the proper legal
 25 standards were not applied in weighing the evidence and making the
 26 decision. *Brawner v. Secretary of Health and Human Services*, 839
 27 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
 28 evidence to support the administrative findings, or if there is

1 conflicting evidence that will support a finding of either
 2 disability or nondisability, the finding of the Commissioner is
 3 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
 4 1987).

ALJ'S FINDINGS

5 At the outset, the ALJ found plaintiff met the DIB
 6 requirements and was insured through December 31, 2007. (Tr. 18.)
 7 At step one the ALJ found plaintiff has not engaged in substantial
 8 gainful activity. (Tr. 18.) At steps two and three, the ALJ found
 9 that plaintiff suffers from diabetes, right eye blindness,
 10 obesity, hypertension, and an adjustment disorder, impairments
 11 that are severe but which do not alone or in combination meet or
 12 medically equal a Listing impairment. (Tr. 18-21.) The ALJ found
 13 plaintiff less than completely credible. (Tr. 23-24.) At step
 14 four, relying on the VE, the ALJ found plaintiff's RFC for a range
 15 of medium work prevents him from performing his past relevant
 16 work. (Tr. 26.) At step five, again relying on the VE, the ALJ
 17 found plaintiff can perform other work, such as motel cleaner,
 18 custodian, and hand packager. (Tr. 26-27.) Accordingly, the ALJ
 19 found that plaintiff is not disabled as defined by the Social
 20 Security Act. (Tr. 28.)

ISSUES

22 Plaintiff contends the Commissioner erred as a matter of law
 23 by failing to (1) properly weigh the medical evidence,
 24 specifically the opinion of treating PAC David Tuning, and (2)
 25 properly assess credibility. (Ct. Rec. 22 at 14-20, Ct. Rec. 25
 26 at 1-11.) The Commissioner responds that the ALJ's decision
 27 [undisputedly limited to the relevant DIB period of April 1, 2004

1 through December 31, 2007] is supported by substantial evidence
 2 and free of legal error, and should therefore be affirmed. (Ct.
 3 Rec. 24 at 7, 17.)

4 DISCUSSION

5 **A. Weighing medical evidence**

6 In social security proceedings, the claimant must prove the
 7 existence of a physical or mental impairment by providing medical
 8 evidence consisting of signs, symptoms, and laboratory findings;
 9 the claimant's own statement of symptoms alone will not suffice.
 10 20 C.F.R. § 416.908. The effects of all symptoms must be
 11 evaluated on the basis of a medically determinable impairment
 12 which can be shown to be the cause of the symptoms. 20 C.F.R. §
 13 416.929. Once medical evidence of an underlying impairment has
 14 been shown, medical findings are not required to support the
 15 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
 16 341, 345 (9th Cir. 1991).

17 A treating physician's opinion is given special weight
 18 because of familiarity with the claimant and the claimant's
 19 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
 20 Cir. 1989). However, the treating physician's opinion is not
 21 "necessarily conclusive as to either a physical condition or the
 22 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
 23 751 (9th Cir. 1989) (citations omitted). More weight is given to
 24 a treating physician than an examining physician. *Lester v.*
 25 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
 26 weight is given to the opinions of treating and examining
 27 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
 28 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining

1 physician's opinions are not contradicted, they can be rejected
 2 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
 3 If contradicted, the ALJ may reject an opinion if he states
 4 specific, legitimate reasons that are supported by substantial
 5 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
 6 F. 3d 1435, 1463 (9th Cir. 1995).

7 In addition to the testimony of a nonexamining medical
 8 advisor, the ALJ must have other evidence to support a decision to
 9 reject the opinion of a treating physician, such as laboratory
 10 test results, contrary reports from examining physicians, and
 11 testimony from the claimant that was inconsistent with the
 12 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
 13 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
 14 Cir. 1995).

15 Acceptable medical sources, as defined by the applicable
 16 regulations, do not include physician's assistants. See C.F.R.
 17 404.1527(a)(2); SSR 06-03p. Opinions from other medical sources
 18 [such as PA's] are important and should be evaluated on key issues
 19 such as impairment severity and functional effects, along with the
 20 other relevant evidence. SSR 06-03p. In some situations it may
 21 be even appropriate to give more weight to a medical source
 22 opinion from a non-“acceptable medical source” than to the opinion
 23 of a treating “acceptable medical source.” Such a situation might
 24 arise if the non-acceptable source has seen the person more often
 25 than the treating source and has provided better supporting
 26 evidence and a better explanation of his or her opinion. See SSR
 27 06-03p.

28 Testimony by a lay witness provides an important source of

1 information about a claimant's impairments. An ALJ can reject it
2 only by giving specific reasons germane to each witness. *Smolen v.*
3 *Chater*, 80 F.3d 1273, 1288-1289 (9th Cir. 1996).

4 *Opinion of David Tuning, PAC*

5 Plaintiff initially argues error at step five. (Ct. Rec. 22
6 at 11, 14-15.) His essential argument, however, is that the ALJ
7 failed to properly reject the opinion of David Tuning, PAC.
8 (Ct. Rec. 22 at 15-18.) Plaintiff appears to agree the ALJ was
9 required, at a minimum, to provide specific reasons germane to Mr.
10 Tuning for rejecting his opinion. According to plaintiff, since
11 there is no evidence undermining Mr. Tuning's "statements
12 regarding Mr. Stonewall's vertigo and nausea," these statements
13 should be credited as true. (Ct. Rec. 22 at 18.)

14 Both arguments are unsupported by the record.

15 Plaintiff's argument fails. The ALJ gave specific reasons
16 supported by substantial evidence for rejecting Mr. Tuning's
17 opinions. In addition, other evidence, including some of Mr.
18 Tuning's records, undermine Mr. Tuning's opinions with respect to
19 nausea and vertigo.

20 It is undisputed plaintiff has a long history of right eye
21 problems, including branch vein occlusions resulting in clinically
22 significant macular edema and scatter laser treatment in the
23 1990's. (Ct. Rec. 18, 252.) The ALJ notes treating ophthalmologist
24 John D. Willer, D.O., opined in October of 2002 plaintiff is
25 legally blind in his right eye. (Tr. 19, referring to Exhibit
26 3F.) After a consultative ophthalmologic examination by Daniel J.
27 Kelly, M.D., in August of 2005, Dr. Kelly confirmed plaintiff's
28 right eye vision deficit and noted bilateral mild background

1 diabetic retinopathy without diabetic macular edema. (Tr. 19,
2 referring to Exhibit 9F.) Vision in plaintiff's left eye is
3 correctable to 20/40. (Tr. 107, 198.)

4 Plaintiff alleges the ALJ should have found he suffers from
5 impaired attention and concentration, deficits caused by right eye
6 blindness. He contends evidence of eye fatigue, vertigo and
7 nausea support his alleged limitations in concentration and
8 attention. (Ct. Rec. 22 at 14-15, Ct. Rec. 25 at 2-4.)

9 A partial overview of Mr. Tuning's relevant records related
10 to plaintiff's eye fatigue and resulting symptoms includes:

11

12 4/11/02: needs to find other work activities besides
13 driving. He is aware of this and accepts this.

14

(Tr. 271)

15

16 5/17/02: can't drive "though is able to do other work
17 activity." (Tr. 284)

18

19 6/7/02: gets motion sick with travel even riding in car; of
20 course has lost his depth perception with his
21 monocular vision. He is unable to work. (Tr. 273)

22

23 1/31/03: headaches seem to have subsided since he is not
24 out-straining the eye as much or his other eye has
25 adjusted. (Tr. 268)

26

27 8/20/05: motion sickness secondary to monocular vision;
28 nausea. Of course unemployable. (Tr. 256.)

10/17/07: no headaches and generally is feeling well
(Tr. 301)

1/16/08: headaches secondary to vision loss; dizziness (Tr. 298)

7 Significantly, plaintiff fails to even mention in either his
8 opening or reply brief Mr. Tuning's January of 2003 [before the
9 relevant period began on April 1, 2004] record indicating
10 plaintiff's headaches due to eye strain seem to have subsided (Tr.
11 268), even though the ALJ relied on it as one of the reasons to
12 reject more severe limitations assessed by Mr. Tuning and the
13 Commissioner pointed it out in his brief.

14 The ALJ rejected some of Mr. Tuning's opinions for a variety
15 of reasons, only some of which are included for review purposes.
16 The ALJ notes Mr. Tuning's opinions of plaintiff's ability to work
17 are internally inconsistent and contradicted by other evidence.
18 (Tr. 25.) As can be seen in the records referenced above, Mr.
19 Tuning opined on May 17, 2002, plaintiff could do work other than
20 driving (Tr. 284). Less than a month later he opined plaintiff
21 was unable to work (Tr. 273). There is nothing in the record
22 indicating plaintiff's condition worsened between May 17, 2002 and
23 June 7, 2002 to support Mr. Tuning's changed assessment.

With respect to internal inconsistencies, the ALJ made one error. He incorrectly attributes the February of 2002 RFC for light work to Mr. Tuning (Tr. 25, referring to Tr. 272); and notes the RFC is inconsistent with Mr. Tuning's opinions in April, May and June of 2002 that plaintiff was unable to work because he

1 could not drive at his job. (Tr. 25, referring to Tr. 271, 273,
2 283-284.) To the extent the ALJ relied on this specific
3 contradiction to reject Mr. Tuning's assessment, he erred. In
4 light of the record as a whole, though, the Court finds the error
5 is harmless.

6 The ALJ rejected Mr. Tuning's opinions as undermined by other
7 evidence of record, in addition to their internal inconsistencies.
8 (Tr. 25.) The ALJ notes the record does not contain any opinions
9 from other treating or examining physicians indicating plaintiff
10 is disabled or even has limitations greater than those in the RFC
11 assessed by the ALJ. (Tr. 25.) The ALJ points out examining
12 psychologist Lawrence J. Lyon, Ph.D., assessed a Global Assessment
13 of Functioning (GAF) of 58, indicating a moderate level of
14 impairment in social or occupational functioning. (Tr. 25,
15 referring to Exhibit 8F.) Office visit notes reflect "numerous
16 periods of time during which the claimant did not specify any
17 particular complaint and relatively infrequent trips to the doctor
18 for allegedly disabling symptoms." (Tr. 23.)

19 The ALJ is correct. Plaintiff's medical history reveals he
20 generally saw Mr. Tuning every three months for diabetes follow
21 up. Other treatment and complaints have been inconsistent with
22 allegedly disabling vertigo, dizziness and nausea: **(a)** able to do
23 light work (2/28/02 at Tr. 272, Derek Earl, D.O.); **(b)** okay to
24 drive despite complaints of motion sickness while driving (4/4/02
25 at Tr. 200-201, Cascade Eye Center); **(c)** needs to find other work
26 (4/11/02 at Tr. 271, Tuning); **(d)** plaintiff reports increased pain
27 when exercising (5/13/02 at Tr. 273, Tuning); **(e)** can do work
28 other than driving (5/17/02 at Tr. 284, Tuning); **(f)** gets motion

1 sickness riding in car (6/7/02 at Tr. 273, Tuning); (g) cannot do
2 work of any kind and "of course is unable to drive" (6/17/02 at
3 Tr. 286, Tuning); (h) doing pretty well, planning elk hunting
4 (10/25/02 at Tr. 269, Tuning); (i) headaches subsided since not
5 over straining eye and/or other eye has adjusted (1/31/03 at Tr.
6 268, Tuning); (j) ER - influenza (3/21/03 at Tr. 232); (k)
7 diabetes follow up: "feeling pretty good" (3/3/04 at Tr. 264,
8 Tuning); (l) diabetes uncontrolled (6/4/04 at Tr. 263, Tuning);
9 (m) complains of difficulty with depth perception; driving; needs
10 "disability papers completed (6/28/04 at Tr. 241, Cascade Eye
11 Center); (n) blood sugar uncontrolled (8/18/04 at Tr. 262,
12 Tuning); (o) blood sugar improved, review in 1 month (8/30/04 at
13 Tr. 261, Tuning); (p) blood sugar improved, review in 1 month
14 (10/8/04 at Tr. 260, Tuning); (q) sub-optimal diabetes control
15 (11/7/04 at Tr. 257, Tuning); (r) review blood sugar log in 3
16 months (1/17/05 at Tr. 257, Tuning); (s) motion sickness and
17 nausea; return in 3 months (8/12/05 at Tr. 256, Tuning); (t) still
18 has vision problems (10/18/06 at Tr. 309, Tuning); (u) changed
19 alternator in wife's car (3/1/07 at Tr. 307, Tuning); (v) reports
20 past eye exam normal (6/5/07 at Tr. 306, Nawang Sherpa, M.D.); (w)
21 diabetes uncontrolled (6/13/07 at Tr. 305, Tuning); (x) chronic
22 back pain; return in 3 months ((8/7/07 at Tr. 303, Tuning); (y) no
23 headaches, uncontrolled diabetes (10/17/07 at Tr. 301, Tuning);
24 and (z) headaches secondary to vision problems, no driver's
25 license; needs to lie down 2 hours a day (1/16/08 at Tr. 298-299,
26 Tuning).

27 In addition to plaintiff's ER visit for influenza in 2003
28 noted above, he was seen in the ER for bronchitis in May of 2006

1 (Tr. 310) and in December of 2006 and June of 2007 for acute
2 sinusitis. (Tr. 319, 329.) At the hearing plaintiff testified he
3 "told the doctor [he] gets it [dizziness] once in a while." (Tr.
4 337.)

5 The ALJ is correct that Mr. Tuning's opinions are not
6 supported by the medical records.

7 To further aid in weighing the conflicting medical evidence,
8 the ALJ evaluated plaintiff's credibility and found him less than
9 fully credible. (Tr. 23-24.) Credibility determinations bear on
10 evaluations of medical evidence when an ALJ is presented with
11 conflicting medical opinions or inconsistency between a claimant's
12 subjective complaints and diagnosed condition. See *Webb v.*
13 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

14 It is the province of the ALJ to make credibility
15 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
16 1995). However, the ALJ's findings must be supported by specific
17 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
18 Cir. 1990). Once the claimant produces medical evidence of an
19 underlying medical impairment, the ALJ may not discredit testimony
20 as to the severity of an impairment because it is unsupported by
21 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
22 1998). Absent affirmative evidence of malingering, the ALJ's
23 reasons for rejecting the claimant's testimony must be "clear and
24 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
25 "General findings are insufficient: rather the ALJ must identify
26 what testimony not credible and what evidence undermines the
27 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
28 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

1 Three of the factors the ALJ relied on when he assessed
2 credibility include: 1) activity levels incompatible with the
3 degree of impairment alleged; 2) a lack of treatment and other
4 evidence related to claimed severe vertigo, dizziness and nausea;
5 and 3) plaintiff's inconsistent statements. (Tr. 22-25.)

6 The record supports the ALJ's reasons.

7 During the relevant period of April 1, 2004 through December
8 31, 2007, plaintiff's activities have included driving (6/28/04 at
9 Tr. 241), hunting and camping once or twice a year (5/3/05 at Tr.
10 132), starting a fire every morning, feeding the dogs, meeting his
11 son at the bus stop and giving him a snack daily after school, as
12 well as tinkering in the shop and trying to "get the garden going"
13 (5/20/05 at Tr. 250), driving in May of 2005 (Tr. 131), fixing an
14 alternator in March of 2007 (Tr. 307), and continuing to hunt elk
15 in 2008 (Tr. 339-340)(Tr. 22-24.)

16 The lack of medical treatment for allegedly severe dizziness
17 has been discussed above in the context of the ALJ's reason for
18 rejecting Mr. Tuning's opinions.

19 Plaintiff's descriptions of his abilities have been
20 inconsistent, as the ALJ correctly observes. (Tr. 22-24.) The ALJ
21 notes on October 30, 2002, plaintiff reported he could walk for
22 one hour, sit 2 hours, and stand 30 minutes before needing to rest
23 up to 2 hours, sometimes as much as 2-3 times each day. He could
24 occasionally lift 20 pounds but could not do household chores or
25 yard work due to dizziness. (Tr. 23, citing Exhibit 5E; Tr. 94-
26 96.) The ALJ observes five days before he completed the
27 questionnaire at Exhibit 5E, on October 25, 2002, plaintiff
28 reported he planned to go elk hunting and is described as doing

1 pretty well. (Tr. 23, referring to Exhibit 10F at Tr. 269.) The
 2 ALJ further observes, despite plaintiff's description of limited
 3 abilities in 2002, in May of 2005, he reported considerably more
 4 activities of daily living. (Tr. 23, citing Exhibit 10E.) On May
 5 3, 2005, plaintiff reported he goes to his neighbor's for coffee
 6 on a good day, then sits or walks outside. In the afternoon, he
 7 goes to meet his son at the bus stop after school and makes him a
 8 snack. He reported driving and hunting and camping 1-2 times a
 9 year. (Tr. 23, referring to Tr. 128.) The ALJ points out later
 10 that month, on May 20, 2005, plaintiff told Dr. Lyon he starts the
 11 fire in his home every morning, wanders around his five acres,
 12 tinkers in his shop and tries to get the garden going. (Tr. 23,
 13 referring to Tr. 250.)

14 The ALJ properly relied on plaintiff's activities, which are
 15 inconsistent with claimed severe impairments of nausea and
 16 dizziness, on the lack of evidence of dizziness and nausea,
 17 including infrequent treatment and complaints, and on plaintiff's
 18 inconsistent statements when he found plaintiff less than
 19 completely credible. (Tr. 22-24.)

20 The ALJ's reasons for finding plaintiff less than fully
 21 credible are clear, convincing, and fully supported by the record.
 22 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
 23 2002)(proper factors include inconsistencies in plaintiff's
 24 statements, inconsistencies between statements and conduct, and
 25 extent of daily activities). Noncompliance with medical care or
 26 unexplained or inadequately explained reasons for failing to seek
 27 medical treatment also cast doubt on a claimant's subjective
 28 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.

1 2d 597, 603 (9th Cir. 1989).

2 The ALJ's reasons for rejecting some of Mr. Tuning's
 3 opinions are specific, germane to Tuning's opinions, and supported
 4 by the record. The ALJ observes Mr. Tuning appeared to rely quite
 5 heavily on plaintiff's subjective reports of his symptoms and
 6 limitations. (Tr. 25.) As previously indicated, Mr. Tuning's
 7 opinions are internally contradictory and inconsistent with the
 8 rest of the evidence, including plaintiff's activities. (Tr. 25.)

9 These are specific reasons, germane to Mr. Tuning's opinion,
 10 for the ALJ to reject Mr. Tuning's assessed limitation of the need
 11 to lie down daily due to dizziness. See *Bayliss v. Barnhart*, 427
 12 F.3d 1211, 1216 (9th Cir. 2005).

13 The ALJ's assessment of Mr. Tuning's opinion and plaintiff's
 14 credibility are fully supported, but the Court notes one error,
 15 italicized below:

16 "[In October of 2002 plaintiff] alleged he was unable to
 17 perform handling/fingering motions, even though he has alleged no
 18 impairment that would reasonably affect this ability."
 19 (Tr. 23, referring to Tr. 95.)

20 In the Court's view, plaintiff's vision impairment,
 21 particularly before his eyes adjusted, is one that could
 22 reasonably affect plaintiff's handling/fingering abilities.
 23 However, the Court finds the error harmless for several reasons.
 24 Plaintiff testified that after onset, he applied for jobs in
 25 logging and farming, indicating he believed he was able to perform
 26 handling/fingering sufficiently to perform these jobs. (Tr. 334.)
 27 And, activities of lighting a daily fire belie any severe
 28 impairment in the these areas. (Tr. 250.)

1 A mistake that is "nonprejudicial to the claimant or
 2 irrelevant to the ALJ's ultimate disability conclusion" is
 3 harmless error. *Stout v. Comm'r. Soc. Sec. Admin.*, 454 F.3d
 4 1050, 1052 (9th Cir. 2006). In the Court's view, the ALJ's
 5 erroneous statement is irrelevant to the ultimate disability
 6 conclusion and is, therefore, harmless.

7 The ALJ is responsible for reviewing the evidence and
 8 resolving conflicts or ambiguities in testimony. *Magallanes v.*
 9 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
 10 trier of fact, not this court, to resolve conflicts in evidence.
 11 *Richardson*, 402 U.S. at 400. The court has a limited role in
 12 determining whether the ALJ's decision is supported by substantial
 13 evidence and may not substitute its own judgment for that of the
 14 ALJ, even if it might justifiably have reached a different result
 15 upon de novo review. 42 U.S.C. § 405 (g).

16 The ALJ observes plaintiff testified a company with whom he
 17 had disability insurance ended his benefits after 2 years, finding
 18 him eligible for some kind of work. (Tr. 23, referring to Tr.
 19 339.) In 2005, the ALJ notes, plaintiff was told he could go to
 20 work in Vancouver [presumably Washington] but he did not want to
 21 relocate. (Tr. 24, referring to Tr. 249.) And, plaintiff
 22 testified he still has a driver's license. (Tr. 340.)

23 With respect to attention and concentration for extended
 24 periods, the ALJ assessed a moderate limitation. (Tr. 21.) He
 25 included it in the hypothetical to the VE. (Tr. 343.) Plaintiff
 26 contends a marked limitation should have been assessed, and
 27 asserts complaints of disabling dizziness, nausea and vertigo
 28 support a marked limitation in this area. (Ct. Rec. 22 at 14-15;

1 Ct. Rec. 25 at 2-3.)

2 There is no evidence plaintiff has been disabled by
3 dizziness, vertigo or nausea for the requisite twelve month
4 period, beyond his own unreliable self-report and Mr. Tuning's
5 contradictory opinions. Other than Mr. Tuning, no treatment
6 provider has opined plaintiff is disabled or unable to perform
7 medium work.

8 The record does not support a marked limitation in attention
9 and concentration. The ALJ's assessed RFC is fully supported by
10 the record and without error.

11 After review the Court finds the ALJ's assessment of all of
12 the evidence is supported by the record and free of legal error.

13 **CONCLUSION**

14 Having reviewed the record and the ALJ's conclusions, this
15 court finds that the ALJ's decision is free of legal error and
16 supported by substantial evidence..

17 **IT IS ORDERED:**

18 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 23**) is
19 **GRANTED**.

20 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 21**) is
21 **DENIED**.

22 The District Court Executive is directed to file this Order,
23 provide copies to counsel for Plaintiff and Defendant, enter
24 judgment in favor of Defendant, and **CLOSE** this file.

25 DATED this 17th day of November, 2009.

26
27 s/ James P. Hutton
28 JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT